No. 75-1225

In the Supreme Court of the United States

OCTOBER TERM, 1975

LOUIS A. MARKERT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, Louis A. Markert, prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Seventh Circuit reversing an order of suppression of his grand jury testimony and subsequent statements to government attorneys and investigators; all pursuant to grand jury subpoena, which testimony and statements were in response to inquiries by the federal executive or grand jury, and related directly to

petitioner's acts as a legislator and member of the Illinois General Assembly, all relating to the State of Illinois legislative process and function.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, in *United States* v. *Craig,* et al., No. 74 Cr 877 is not officially reported but is printed in the Appendix to this Petition (App. A, pp. 1-10). The opinion of the United States Court of Appeals for the Seventh Circuit reversing the Order of Suppression under the same title, No. 75-1592 of that Court was entered on January 5, 1976 and is not yet officially reported but is printed in the Appendix hereto (App. B, pp. 11-33).

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was filed on January 5, 1976 (App. B). A timely Petition for Rehearing was denied on January 27, 1976 (App. C, p. 34). This Petition is filed within 30 days of that date. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).[1]

[1] A Petition for Rehearing and a Suggestion for Rehearing En Banc is due to be filed by the government on or before March 10, 1976. This delay is a result of two motions for extension of time, both *granted,* to the government. However, a motion made to the Court of Appeals to recall this denial of the Petition for Rehearing, pending the determination of the Government's Petition for Rehearing, in order that all matters may be disposed of at once, has been *denied.*

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's decision in *United States* v. *Brewster* (408 U.S. 501) holding that "The immunities of the Speech and Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators (408 U.S. at 507) precludes any contention that such a privilege may be waived by an individual legislator.

2. Whether a recognized Speech or Debate privilege forecloses judicial or executive inquiry into legislative activity without reference to waiver by an individual member of the legislative body on the basis that the privilege is historically institutional. (*United States* v. *Johnson,* 383 U.S. 169)

3. Whether this Court, in footnote 13 of its decision in *Gravel* v. *United States,* 408 U.S. 606 (622), which states that a Senator's "aide's claim of privilege can be repudiated and thus waived by the Senator", a mere refusal to invoke the Fifth Amendment by the State legislator which the Seventh Circuit has equated into a waiver of the legislative right against inquiry expressly stating in its opinion (App. 26) that "we need not find a knowing and intelligent forfeiture of the right".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 6, Clause 1, United States Constitution

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Fel-

ony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Article IV, Section 12, Illinois Constitution of 1970

Except in cases of treason, felony or breach of peace, a member shall be privileged from arrest going to, during, and returning from sessions of the General Assembly. A member shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house. These immunities shall apply to committee and legislative commission proceedings.

STATEMENT OF THE CASE

This case originated by the filing of an indictment in two counts against petitioner, a former member of the Illinois General Assembly and two present members, (plus an unindicted co-conspirator also a legislator) under the provisions of Title 18 U.S.C. § 1951, and § 1341.

Under the terms of the Indictment, at all times pertinent thereto this petitioner was a duly elected member of the House of Representatives of the State of Illinois (Para. 1) and of the Seventy-Eighth General Assembly, "entrusted and vested by reason of his office with the legislative power of the State of Illinois." (Para. 2)

It is, further, alleged in Count I that he, and three others, did "conspire to use the power and authority vested in them by reason of their office as members of the House of Representatives to unlawfully obtain and cause to be obtained property. . . ." (Para. 5)

Paragraph 3 of Count I describes the alleged victims of the scheme as being defrauded of this defendant's

"loyal, faithful and honest services in their official positions as members of the House of Representatives. . ." (sub-para. a), and of the alleged victims' right to honest and lawful conduct of the legislative business of the State. (sub-para. b)

The scheme as alleged in Paragraphs 4 through 8, describes the introduction of House Bill 2025; the postponement of consideration of that Bill; conferring with a registered lobbyist about paying money for the stopping of the passage of the Bill, and soliciting the same, and causing the tabling of said Bill.

Together with moving (ultimately unsuccessfully) to dismiss the indictment so violative of the Speech or Debate Clause of the United States Constitution (Art. I, §6) and of the State of Illinois (Art. IV, §12), this petitioner also moved to suppress statements he made to inquiries put to him by the office of the United States Attorney before the Grand Jury, pursuant to Grand Jury subpoena and less formally (but still with the understanding that statements made were under the command of the subpoena) to such attorneys and federal agents.

On each occasion, petitioner was clearly advised of his privilege against self-incrimination under the Fifth Amendment. He did not invoke that right. When he moved for suppression, he did so on the basis that he had no knowledge of whatever rights he might have in his legislative capacity concerning his legislative functions. His counsel admitted he was not advised, because counsel herself was not aware, and the government admitted it only informed him of his fifth amendment rights. (Common Law Record, Doc. 56).

Without hearing on whether, in testifying and giving statements, petitioner had voluntarily relinquished any

known right, the trial judge found no right or capability in petitioner to waive.

> "The Court concludes, upon consideration of the relevant authorities, that it would defeat the purpose of the Illinois Speech or Debate Clause if an individual legislator could waive a protection which was personal to him. It is clear, in the opinion of this Court, based on the plain wording of the Illinois Speech or Debate Clause and on the language of Supreme Court opinions, that the privilege operates as a complete bar to inquiry into legislative activities. The Court holds that the privilege is not personal to a legislator and may not be waived. The Speech or Debate Clause was designed to protect the legislative process and render it immune from intimidation. The fact that a legislator benefits from its protection does not alter the nature of the privilege.
>
> "The judicial or executive branches of government may not avoid this constitutional prohibition by the fortuitous expedient of obtaining the willing cooperation of a legislator, who chooses to volunteer information, thereby creating an inhibiting effect on the legislative activities of other members of the legislature. While there is nothing, as a practical matter, which can prevent a legislator from volunteering information on protected activities, the Speech or Debate Clause prohibits this Court from listening." (App. 5-6)

Accordingly, the lower court suppressed certain defined testimony and statements made by petitioner. (App. 8-10)

From that suppression order, the United States appealed, and the Court of Appeals reversed. (App. B)

While the District Court found the protection of the Illinois Constitution to insulate the petitioner, the Court of Appeals for the Seventh Circuit found a federal common law immunity,[2] and also found that immunity subject to waiver, and that it had been waived.

> "Markert contends that the facts of this case indicate that the decision to testify was not freely made. The heart of his argument is that he was not informed of his right to claim a speech or debate testimonial privilege either by the Government or by his own counsel. However, the Supreme Court has never held that the failure to inform the defendant of a privilege unrelated to trial fairness mandates a finding that the decision was not voluntary. *Schnekloth* v. *Bustamonte, supra,* 412 U.S. at 227; accord, *Byrd* v. *Lane,* 398 F.2d 750, 755 (7th Cir. 1968), certiorari denied, 398 U.S. 1020. When he appeared before the grand jury, he gave potentially damaging testimony rather than relying on his privilege against self-incrimination, of which he had been informed. Because he made a conscious choice to testify, he waived the instant privilege. Although subpoenaed before the grand jury, Markert was not compelled to testify in violation of any of his rights. See *United States* v. *Calandra,* 414 U.S. 338, 346; *Kastigar* v. *United States,* 406 U.S. 441, 448. Because he was a state legislator, knowledgeable in the workings of the Government and represented by competent counsel, his election to testify waived his Speech or Debate clause privilege." (App. 27)

---

[2] For the purpose of this petition, it makes no difference to the petitioner whether the right was secured by the State Constitution or was secured by the federal common law. One way or the other, both courts have secured a right to the petitioner, and it is not necessary at this point to address ourselves to federal-state balance or imbalance.

REASONS FOR GRANTING THE WRIT

The issues here presented are relatively narrow. Whether the Speech or Debate Clause of the Illinois Constitution is an expression of withholding power from the federal government under the Ninth and Tenth Amendments (District Court) or the recognition of a federal common law protection (Ct. of App.) is not of significance and pertinence. Both courts recognize the right in petitioner, and the Seventh Circuit clearly articulated the basic and pragmatic reasoning:

> "Although the speech or debate privilege embraces notions of the separation of powers among co-equal branches of government, its primary message is that legislatures must be able to discharge their lawful responsibility in an atmosphere free from the threat of interference by other governmental units. A legislator in considering whether to support or oppose a proposed law must be free to reflect on the merits; he must not be deterred from advocating a position by the threat of prosecution by a hostile executive. The evil is the fact of deterrence; whether the threat emanates from the local or national executive makes no difference." (App. 21)

We, therefore, submit the following reasons for granting the Writ.

1. The decision of the Court of Appeals herein is directly contrary to this Court's several decisions in respect of the Speech or Debate right. The Court below misconceived the nature of the right in its determination of a "waiver" of Speech or Debate security. This is not a privilege, it is a proscription. The proscription is that the legislator "shall not be questioned" (Art. I, §6, U.S. Constitution); that he "shall not be held to answer" (Art. 4, Section 12, Illinois Constitution, 1970); that "it is not

consonant . . . for a Court to inquire" (*United States* v. *Johnson*, 383 U.S. 169 at 180, Justice Harlan concurring).

It was also stated in *Carter* v. *Carter Coal Co.*, 298 U.S. 238 that "State powers can neither be appropriated on the one hand nor abdicated on the other."

It should also be noted that in *United States* v. *Johnson*, 383 U.S. 169 and in *United States* v. *Brewster*, 408 U.S. 501, this Court emphasized that in trials the proscription went to the inquiry into legislative acts and the impropriety of evoking response, not whether by responding the law-maker had waived; quoting with approval from *Ex Parte Wason*, 4 Q.B. 573, that law-makers "cannot be inquired into" by criminal proceedings.

The Court of Appeals overlooked the fact that a grand jury subpoena is the inception of criminal proceedings. An "inquiry" at the inception is equally proscribed as an "inquiry" on trial.

2. The decision below is in conflict with decisions of this Court holding that waivers of important constitutional rights must be knowingly and intelligently made. The Seventh Circuit has found (App. 26) that a legislator who waived his privilege against self-incrimination under the Fifth Amendment of the Constitution, also waived his Speech or Debate privilege given him under the Illinois Constitution and that "we need not find a knowing and intelligent forfeiture of that right". The decision continued:

> "At all times, appellee was represented by counsel and informed of his right to refuse to answer questions by asserting his Fifth Amendment privilege against self-incrimination."
>
> "* * * he gave potentially damaging testimony rather than relying on his privilege against self-incrimination, of which he had been informed. Be-

cause he made a conscious choice to testify, he waived the instant privilege."

We further submit to the Court that the Appellate Court erroneously presumed knowledge of both petitioner and his counsel. In its decision this Court states:

> "Although subpoenaed before the grand jury, Markert was not compelled to testify in violation of any right. See *United States* v. *Calandra*, 414 U.S. 338, 346; *Kastigar* v. *United States*, 406 U.S. 441, 448. Because he was a state legislator, knowledgeable in the workings of the Government and represented by competent counsel, his election to testify waived his Speech or Debate clause privilege." (App. 27)

We respectfully submit this is a fact determination that may not be presumed. It is emphatically denied that this presumption is based on a bare sampling of human experience, much less is it a product of unequivocal human experience such as would support the presumption.

If this Court should hold to its initial position that this is a waivable right rather than a proscription, it should remand for full hearing on appellee's knowledge of that right, as well as the advice—as well as comprehension—of his counsel at the time of making the statements in issue. Presumption of knowledge, and presumption of intelligent waiver is contrary to all authority extant.

This is especially so when the lower court did not fully explore knowledge and waiver, and never reached any issue thereon, it having been guided by its holding of absolute proscription of executive or judicial inquiry.

3. The Court of Appeals, we believe, completely misconceives this court's unexplained footnote in *Gravel* v. *United States*, 408 U.S. at 622, n.13. The way that Court describes the note is:

> "This analysis is consistent with the Supreme Court's note in *Gravel* v. *United States, supra*, 408 U.S. at 622 n. 13, that a Senator can waive his aide's claim of privilege. If so, the Senator, and Markert in this case, should similarly be able to waive his own privilege. The courts have often held that evidentiary privileges may be waived by the involved individual." (App. 25)

The decision of this Court in *Gravel* cannot in any wise be taken to authorize any implied waiver. *First this Court was adamant that the legislator could not be questioned at all.* As to his aide, this Court did not contemplate any implied waiver. It said, in unmistakable terms that the insulation had first to be "repudiated."[3] Repudiation

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[3] The full text of this Court's decision in *Gravel* v. *U.S.* 408 U.S. at 622 n. 13 is as follows:

> [12-15] The United States fears the abuses that history reveals have occurred *when legislators are invested with the power to relieve others from the operation of otherwise valid civil and criminal laws.* But these abuses, it seems to us, are for the most part obviated if the privilege applicable to the aide is viewed, as it must be, as the privilege of the Senator, and invocable only by the Senator or by the aide on the Senator's behalf,[13] and if in all events the privilege available to the aide is confined to those services that would be immune legislative conduct if performed by the Senator himself. *This view places beyond the Speech or Debate Clause a variety of services characteristically performed by aides for Members of Congress,* even though within the scope of their employment. It *likewise provides no protection for criminal* conduct threatening the security of the person or property of others, *whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction.* Neither does it immunize Senator or aide from testifying at trials or grand jury proceedings involving third-party crimes where the questions do not require testimony about or impugn a legislative act. Thus our refusal to distinguish between Senator and aide in applying the Speech or Debate Clause does not mean that Rodberg is for all purposes exempt from grand jury questioning.

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[13] It follows that an aide's claim of privilege can be *repudiated* and thus waived by the Senator.

Emphasis ours.

negates any implied waiver. It imports knowledge and affirmative rejection. On the state of this record it is a travesty to suggest petitioner "repudiated" that of which he did not know, his counsel did not (at the time) know, and the government did not advise him (because it, too, did not know). The implied waiver relying on this Court's decision in *Gravel,* ignores this Court's articulation of repudiation as necessary thereto—even in the case of an aide. We are not dealing with an aide. We are dealing with an integral element of the legislature itself.

CONCLUSION

Wherefore for the above and foregoing reasons the petitioner respectfully prays this Court issue its Writ of Certiorari to the Court of Appeals for the Seventh Circuit to review the reversal of the suppression order issued by the district court.

Respectfully submitted,

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Of Counsel:
ANNA R. LAVIN

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT CRAIG, et al.,

Defendants.

No. 74 CR 877

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on motion by defendant Markert to suppress evidence. Defendant, a former member of the Illinois General Assembly, argues that certain evidence, including grand jury testimony, was taken from him in violation of the Illinois Speech or Debate Clause. This evidence was submitted to the Court for *in camera* inspection.

Defendant agreed to several interviews and testified before a federal grand jury. At all relevant times defendant was represented by counsel and was given a standard warning concerning his constitutional rights. The government asserts that the Speech or Debate privilege is personal in nature and that defendant waived this privilege when he agreed to give testimony after having been advised of his rights. Defendant argues that the privilege is a complete bar to inquiry which may not be waived by an individual.

The threshold issue is whether the Illinois Speech or Debate Clause accords a personal privilege which may effectively be waived by an individual legislator. This Court is of the opinion that it may not be so waived.

Article 4, Section 12 of the Illinois Constitution of 1970 provides in pertinent part that:

> . . . A member [of the General Assembly] shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house. . .

There is little available case authority pertaining to the Illinois Speech or Debate Clause. Accordingly, since the state and federal privilege have a common historical origin and purpose, the Court will look to those decisions which bear on the federal privilege. The comparable federal privilege is found in Article I, Section 6 of the United States Constitution:

> . . . for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place.

Although the scope of the federal Speech or Debate Clause has been examined at length by the Supreme Court, there has never been a definitive ruling on the issue now before this Court.

In United States v. Johnson, 383 U.S. 169 (1966), the Supreme Court was faced with a constitutional challenge to the indictment of a United States Congressman who allegedly had abused his position by conspiring to give a particular speech in return for payment from private interests.

Mr. Justice Harlan noted that: ". . . the language of the Speech or Debate Clause clearly proscribes at least some of the evidence taken during trial". (383 U.S. at 173) The Court quoted with approval from *Tenney* v. *Brandhove,* 341 U.S. 367, 377 (1951), stating:

> . . . that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. (383 U.S. at 180).

The Court reasoned that despite the reprehensible nature of the charged conduct, the Speech or Debate Clause operated to prevent it from being made the basis of a charge relating to legislative acts. The Court observed:

> The essence of such a charge is that the Congressman's conduct was improperly motivated, and as will appear that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry. (383 U.S. at 180)

Because the Court found that the government's case could be made without reference to legislative acts, the indictment itself withstood attack. However, the Court took care to point out that any prosecution dependent on inquiry into legislative activity necessarily *contravened* the Speech or Debate Clause, and the Court directed the government to prosecute its case without reference to such forbidden area of inquiry.

It is significant that nowhere in *Johnson* did the Court suggest that the Speech or Debate privilege was available at the option of a legislator. The opinion reflects the apparent conclusion that the Clause operates to *foreclose judicial inquiry* into legislative activity.

In *United States* v. *Brewster,* 408 U.S. 501 (1972), the issue before the Court was whether the defendant Senator could be prosecuted on the charge that he had accepted a bribe in exchange for a promise relating to an official act. The Court held that the Speech or Debate Clause operated to bar inquiry into legislative acts, and since such a prosecution was not necessarily dependent on such inquiry, prosecution was not barred.

The Court in both *Johnson* and *Brewster* quoted with approval from *Ex Parte Wason,* L.R. 4 Q.B. 573 (1869):

> I am clearly of opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House *cannot be inquired into* by criminal proceedings with respect to anything they may do or say in the House. (emphasis added) (383 U.S. at 183, 408 U.S. at 509).

The language of the Supreme Court opinions and of the constitutional provisions themselves is plain. The privilege is invariably described in the opinions in terms of a prohibition against judicial or executive inquiry. Likewise, the directive in each of the two relevant constitutional provisions is not to the legislator, that he may avail himself of a privilege attendant upon elective office, but rather to those who would question him. It is said that the legislator "*shall not be questioned* in any other Place" and that he "*shall not be held to answer* before any other tribunal." The plain import of that language is not that the legislator may claim a privilege, but that the executive and judicial branches are prohibited from inquiring into legislative activities.

Such literal interpretation of constitutional language and that of the opinions is entirely consistent with the stated purpose of the Speech or Debate privilege. See *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880); *United States* v. *Johnson, supra; United States* v. *Brewster, supra.*

In *Tenney* v. *Brandhove, supra,* the Court devoted a considerable portion of its opinion to a discussion of the origins and purpose of the privilege. *Mr. Justice* Frankfurter adopted the statement of James Wilson, a member of the Committee which was responsible for the federal Speech or Debate Clause:

> In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense. (341 U.S. at 373)

The Court observed that it was necessary to insure that representatives be able to execute the functions of their office without fear of prosecutions. (341 U.S. at 373, 374) The Court concluded that:

> *Legislators are immune* from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence, but for the public good. (emphasis added) (341 U.S. at 377)

This principle was affirmed in *United States* v. *Johnson, supra,* where the Court stated that the purpose of the privilege was to "prevent intimidation by the executive and accountability before a possibly hostile judiciary." (383 U.S. at 181), and again in *Brewster:*

> The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators. (408 U.S. at 507)

The Court concludes, upon consideration of the relevant authorities, that it would defeat the purpose of the Illinois Speech or Debate Clause if an individual legislator could waive a protection which was personal to him. It is clear, in the opinion of this Court, based on the plain wording of the Illinois Speech or Debate Clause and on the language of Supreme Court opinions, that the privilege operates as a complete bar to inquiry into legislative activities. The Court holds that the privilege is not personal to a legislator and may not be waived. The Speech or Debate Clause was designed to protect the legislative process and render

it immune from intimidation. The fact that a legislator benefits from its protection does not alter the nature of the privilege.

The judicial or executive branches of government may not avoid this constitutional prohibition by the fortuitous expedient of obtaining the willing cooperation of a legislator, who chooses to volunteer information, thereby creating an inhibiting effect on the legislative activities of other members of the legislature. While there is nothing, as a practical matter, which can prevent a legislator from volunteering information on protected activities, the Speech or Debate Clause prohibits this Court from listening.

The Court having held that the Speech or Debate privilege may not be waived, the next issue for determination is which evidence, if any, was taken from defendant in violation of this privilege.

Looking to those Supreme Court cases which deal with the federal Speech or Debate Clause, certain guidelines have emerged.

In *Kilbourn, supra,* it was held that the privilege should be read broadly, to include not only words spoken in debate, but anything generally done in a session of the House by one of its members in relation to the business before it. (103 U.S. at 204) It was further stated in *Brewster, supra,* that the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts. (408 U.S. at 512) The Court there quoted with approval from *Coffin* v. *Coffin, supra* at 27:

> . . . and I would define the article as securing to every member exemption from prosecution, for everything said or done by him, as a representative, in the exercise of the functions of that office; without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. (408 U.S. at 514)

In *Gravel* v. *United States,* 408 U.S. 606 (1972) the Court clarified the scope of the privilege, by stating that committee reports, resolutions, and the act of voting are equally covered.

As was made clear in *Brewster,* however, not all things "related to the due functioning of the legislative process" are shielded by the Clause. (408 U.S. at 513, 515). Thus, political activities must be distinguished from legislative activities.

To the extent that criminal activity is not part of the legislative process, it is not protected. This was the holding of the Supreme Court in *Johnson, supra.* The Court there stated:

> No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no way related to the due functioning of the legislative process. (383 U.S. at 172)

This proposition was affirmed in *Brewster, supra,* where *Mr. Chief Justice* Burger, speaking for the Court, observed:

> Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. It is not an 'act resulting from the nature, and in the execution, of the office.' Nor is it a 'thing said or done by him, as a representative, in the exercise of the functions of that office,' 4 Mass., at 27.

> Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here, or as in *Johnson,* for use of a Congressman's influence with the Executive Branch. And an inquiry into the purpose of a bribe 'does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.' 383 U.S., at 185. (408 U.S. at 526)

The Court has carefully examined the transcript of defendant's grand jury testimony, as well as memoranda of three interviews conducted by postal inspectors and the United States Attorney's office.

Exhibit One is identified as a transcript of defendant's grand jury testimony. The Court is of the opinion that the following language is barred by the Speech or Debate Clause:

> On page 108, beginning with the question, "Are you familiar with . . ." through and including, on page 109, the answer, "To my recollection, no."
>
> Beginning on page 110, with the question, "Now you were a sponsor . . .", through and including, on page 113, the answer, "It was sometime . . . the introduction."
>
> Beginning on page 113, with the question, "And prior to that time . . .", through and including, on page 114, the answer, ". . . no, I have no recollection."
>
> Beginning on page 115, with the question, "And you are aware, are you not . . .", through and including, on page 116, the answer, "I am, yes."
>
> On page 122, beginning with the question, "Did you ever discuss . . .", through and including the answer, "I would assume . . . I would assume I did."

> Beginning on page 128, with the question, "Did you talk . . .", through and including, on page 129, the answer, "No; I was . . . service to the G.A."
>
> On page 133, from the question, "Did you discuss . . ." through and including the answer, "I'm certain . . . can't say."

Exhibit Two is identified as a memorandum of an interview of defendant which was conducted on September 2, 1973 in rural Mt. Sterling, Illinois by two postal inspectors. The Court is of the opinion that the following language is barred by the Speech or Debate Clause:

> Beginning in paragraph 2 of page 2, "Mr. Markert was then asked who was . . ." through and including, in paragraph 1 of page 3, ". . . sponsored that particular bill."
>
> On page 3, "Markert stated that Pappas would . . . Department of Highways, etc."
>
> On page 4, "Mr. Markert then recalled . . . guarantee the outcome of this legislation."
>
> On page 4, "Markert was asked if . . . and other legislative business."
>
> On page 5, "He stated that the majority . . . legislation on individual bills."
>
> On page 5, "Markert related that . . . information on original bills."
>
> On page 5, "When asked if this type . . . was not commonplace either."
>
> On page 5, "Pappas stated that . . . relating to this bill."
>
> On page 6, "Markert said at no time . . . any of the principles involved."

Exhibit Three is identified as a memorandum of a conversation which occurred on September 20, 1973 in Spring-

field, Illinois, between defendant and a member of the United States Attorney's office. The Court finds nothing within this memorandum which is privileged under the Speech or Debate Clause.

Exhibit Four is identified as a memorandum of an interview of defendant which was conducted on November 19, 1974 in Chicago, Illinois by a postal inspector and a member of the United States Attorneys' office. The Court is of the opinion that the following language is barred by the Speech or Debate Clause:

> All of paragraph 3 of page 2, "Mr. Holderman asked . . . Doris Steinberg about the bill."
>
> In paragraph 4 of page 3, "He stated that he . . . would be assigned to him."
>
> In paragraph 4 of page 4, "He said that he probably . . . interested in this bill."
>
> In paragraph 4 of page 5, "Again, he stated that . . . or even kill it."

Order to be entered in accordance with this opinion.

Enter: /s/ *Alfred Y. Kirkland*
Alfred Y. Kirkland, Judge

Dated: May 23, 1975

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-1592

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

ROBERT CRAIG, THOMAS J. HANAHAN and LOUIS A. MARKERT,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

No. 74 CR 877

ALFRED Y. KIRKLAND, *Judge*

Argued September 26, 1975 — Decided January 5, 1976

Before CUMMINGS and TONE, *Circuit Judges,* and KUNZIG, *Judge.**

CUMMINGS, *Circuit Judge.* In December 1974, appellee Louis A. Markert, and co-defendants Robert Craig and Thomas J. Hanahan were indicted on two charges of political corruption. Count One alleged that while mem-

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* Judge Robert L. Kunzig of the United States Court of Claims is sitting by designation.

bers of the Illinois House of Representatives they and their unindicted co-conspirator Pete Pappas allegedly extorted $1500 from members of the Illinois Car and Truck Renting and Leasing Association, inducing the payments "under color of official right" in violation of the Hobbs Act (18 U.S.C. § 1951). Count Two charged that the same individuals engaged in a scheme to defraud the citizens of Illinois of their "loyal, faithful and honest services in their official positions" and "of their right to have the legislative business of the State of Illinois conducted honestly" by accepting $1500 to block passage of a certain bill. The scheme was said to violate the Mail Fraud Statute (18 U.S.C. § 1341).

During the grand jury's investigation of alleged corruption in the Illinois General Assembly, the appellee consented to interviews with postal inspectors in September 1973 and to an interview with postal inspectors and an Assistant United States Attorney in November 1974. In addition, he testified under subpoena before the grand jury on September 13, 1973. At all times, appellee was represented by counsel and informed of his right to refuse to answer questions by asserting his Fifth Amendment privilege against self-incrimination. He declined, however, to invoke this privilege and answered all questions put to him by the postal inspectors, Assistant United States Attorney and before the grand jury.

In February 1975, Markert moved to suppress his grand jury testimony and the other statements he gave to government agents on the ground that they were obtained from him in violation of the federal and state Speech or Debate Clauses. A few weeks later, the district judge ruled that Markert was entitled to the protection of the privilege accorded by the Speech or Debate Clause of the

Illinois Constitution.[1] Consequently, the district court ordered Markert to provide "a concise written statement of what evidence, if any, was taken from him in violation of his [Illinois] constitutional privilege."

Subsequently, the district court handed down an unreported memorandum opinion and order granting Markert's motion to suppress certain portions of his grand jury testimony and parts of the interviews he gave to postal inspectors and the Assistant United States Attorney. The court decided that a legislator could not waive the privilege accorded by the Speech and Debate Clause of the State Constitution and "that the executive and judicial branches are prohibited from inquiring into legislative activities." The Government has appealed pursuant to 18 U.S.C. § 3731.

The primary question is whether state legislators have a Speech or Debate privilege, conferred either by the Illinois Constitution or as a matter of federal common law, which bars the admission of certain evidence against state legislators in a federal criminal prosecution. If so, we must then decide whether Markert waived that privilege.

I

The Federal Rules of Evidence became effective July 1, 1975.[2] Rule 501 is the pertinent rule and provides as follows:

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[1] In pertinent part, Article 4, Section 12, of the Illinois Constitution of 1970 provides:

> "* * * A member of the [General Assembly] shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house. * * *"

[2] Under *United States* v. *McCarthy*, 445 F.2d 587, 590-591 (7th Cir. 1971), this Circuit has applied these rules even before their effective date.

"Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

This version of Rule 501 does not alter the pre-existing criminal law in the federal courts. The standard embodied in the first sentence of Rule 501 was derived from Rule 26 of the Federal Rules of Criminal Procedure. See Senate Report No. 93-1277, 93rd Cong., 2d Sess., 4 U.S. Code, Cong. & Admin. News 7051, 7058 (1974); House Report No. 93-650, 93rd Cong., 2d Sess., 4 U.S. Code, Cong. & Admin. News 7075, 7082 (1974). Rule 26 provided:

"The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[3]

This rule was promulgated in 1944 (effective in 1945) as part of the Federal Rules of Criminal Procedure. Prior to those rules, the law of evidence to be applied in federal

[3]After the Federal Rules of Evidence were adopted in 1975, Rule 26 was amended to provide as follows:

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court."

criminal cases was uncertain. See Howard, Evidence in Federal Criminal Trials, 51 Yale L. J. 763 (1942). Neither state law nor federal law clearly applied. The governing statute, the Rules of Decision Act, provided that "the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in Courts of the United States, in cases where they apply" (1 Stat. 92, now 28 U.S.C. § 1652). As interpreted by the Supreme Court, the statute required the federal courts in a criminal case to apply the law of the state in which the trial was held as it existed in 1789. *United States* v. *Reid*, 53 U.S. 361, 363. If the state was admitted to the Union after 1789, the common law as of the date of admission controlled. *Logan* v. *United States*, 144 U.S. 263, 303. These principles, however, were not strictly followed. At times, the Supreme Court examined state laws of evidence in the light of "general authority and sound reason," rejecting them where they were antiquated or inappropriate. *Benson* v. *United States*, 146 U.S. 325, 335; see *Rosen* v. *United States*, 245 U.S. 467. Finally in *Funk* v. *United States*, 290 U.S. 371, and *Wolfle* v. *United States*, 291 U.S. 7, the Court abandoned any strict adherence to state rules of evidence in criminal cases, adopting instead a flexible standard which would allow the federal courts to modify or disregard local laws of privilege "in the light of reason and experience." 291 U.S. at 12. These two cases were the basis for Rule 26. See Advisory Committee Notes to Rule 26; Vanderbilt, New Rules of Criminal Procedure, 29 A.B.A.J. 376, 377. Under Rule 26 the federal courts were free to fashion a federal law of evidence consistent with the Federal Rules of Criminal Procedure and Congressional statutes. See *Elkins* v. *United States*, 364 U.S. 206, 216; Cummings,

The Third Adventure, 29 A.B.A.J. 654, 655. As the 1940 Criminal Rules Enabling Act (18 U.S.C. § 3771) provided in pertinent part:

> "All laws in conflict with such rules [of criminal procedure] shall be of no further force and effect after such rules have taken effect."

The House Committee Report on Section 3771 showed that its purpose was to render it unnecessary to "search the common law, statutes, and constitutional provisions of the States * * *" (H. Rep. No. 2492, 76th Cong., 3d Sess., 2 (1940)), in determining the admissibility of evidence in criminal cases. Thus Rule 26 envisioned that the admissibility of evidence in criminal cases in federal courts would be governed by federal law and would not be dependent upon diverse state laws, including state constitutional provisions. *Elkins* v. *United States, supra,* 364 U.S. at 216; *Heathman* v. *United States District Court,* 503 F.2d 1032, 1034 (10th Cir. 1974).

Similarly, Rule 501 contemplates that "federal privilege law applies in criminal cases." Conference Report No. 93-1597, 93rd Cong., 2d Sess., 4 U.S. Code, Cong. & Admin. News 7098, 7100 (1974). However, nothing in the language of the rule or its legislative history indicates that courts are prohibited from recognizing as a matter of federal common law a speech or debate privilege for state legislators. The legislative history of Rule 501 was indeed stormy. The Supreme Court Advisory Committee's draft contained nine non-constitutional privileges (56 F.R.D. 234-256), and its proposed Rule 501 provided that only the enumerated privileges and those required by the federal Constitution or Act of Congress need be recognized by the federal courts (56 F.R.D. 230). This draft of Article V on Privileges aroused such furor when the Supreme Court submitted it to Congress that the House

Committee on the Judiciary eliminated the nine privileges in favor of the present Rule 501. This was done because the rules as submitted to Congress "contained controversial modifications or restrictions upon common law privileges." Senate Rep. No. 93-1277, *supra,* 4 U.S. Cong. & Admin. News 7058 (1974). With this background, surely there would have been a hint in the history of revised Rule 501 if Congress had intended to override the common law privilege inherent in the Speech or Debate Clause of the federal and state constitutions.

These rules mandate that we neither categorically reject nor accept the defendant's claim of a speech or debate privilege. Rather, we are instructed to determine whether "the principles of the common law * * * in the light of reason and experience" dictate the recognition of a federal common law speech or debate privilege to be applied in federal criminal prosecutions of state legislators. We hold that Markert has such a privilege.

A product of the 17th century struggle for parliamentary supremacy, legislative freedom of speech and debate "was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." *Tenney* v. *Brandhove,* 341 U.S. 367, 372. The Speech or Debate Clause of the federal Constitution was adopted at the constitutional convention without discussion or dissent. See V Elliot's Debates 406 (1836 ed.); II Records of the Federal Convention 246 (Farrand ed. 1911). Most states have incorporated similar provisions in their constitutions. See *Tenney* v. *Brandhove, supra,* 341 U.S. at 373-375. And in its most recent cases, the Supreme Court has reaffirmed that the Speech or Debate clause is an essential tenet of the American political system. See *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491; *Doe* v. *McMillan,* 412 U.S. 306; *Gravel* v. *United States,* 408 U.S. 606; *United States* v. *Brewster,* 408 U.S. 501.

The clause originated, and its purpose remains, "to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability." *Tenney* v. *Brandhove, supra,* 341 U.S. at 375. It is immaterial that the legislator may have had an unworthy motive. As Justice Frankfurter in *Tenney* (at 377):

> "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good."

This protection of the legislature's independence applies whether the judicial proceeding is civil or criminal. The privilege developed in England in response to the King's seditious libel prosecutions of dissident members of Parliament. See *United States* v. *Johnson, supra,* 383 U.S. at 181-183. Similarly, the Supreme Court has held that the clause applies to criminal prosecutions of members of Congress. *United States* v. *Brewster, supra; United States* v. *Johnson, supra.* The express purpose of the clause is to protect legislators "against possible prosecution by an unfriendly executive and conviction by a hostile judiciary" for their acts as legislators. *United States* v. *Johnson, supra,* 383 U.S. at 179. The clause therefore contains substantive and evidentiary elements. The content of a legislator's speech on the floor of the chamber or comment in Committee room cannot be made the basis of either civil (*Doe* v. *McMillan, supra,* 412 U.S. at 312; *Powell* v. *McCormack,* 395 U.S. 486, 502-503; *Dombrowski* v. *Eastland,* 387 U.S. 82, 85; *Tenney* v. *Brandhove, supra,* 367 U.S. at 377; *Kilbourn* v. *Thompson,* 103 U.S. 168, 203) or criminal liability. *Gravel* v. *United States, supra,* 408 U.S. at 624; *United States* v. *Brewster, supra,* 408 U.S. at 514; *United States* v. *Johnson, supra,* 383 U.S. at 180. Nor may legislators be required to answer questions about

their legislative activities. *United States* v. *Brewster, supra,* 408 U.S. at 525; *United States* v. *Johnson, supra,* 383 U.S. at 183. In *Johnson,* the Court approved the English rule that "the motives or intentions of members of either House [of Parliament] cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House." 383 U.S. at 183, quoting *Ex parte Wason,* L.R. 4 Q.B. 573, 577 (1869). Although construed broadly to protect any activity "generally done in a session of the House by one of its members in relation to the business before it" (*United States* v. *Johnson, supra,* 383 U.S. at 179; *Kilbourn* v. *Thompson, supra,* 103 U.S. at 204), the privilege does not apply to a criminal proceeding which "does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." *United States* v. *Brewster, supra,* 408 U.S. at 510; *United States* v. *Johnson, supra,* 383 U.S. at 185.

Only the evidentiary aspect of the speech or debate privilege is involved in this appeal. Markert contends simply that he cannot be required to answer questions put to him by the grand jury and government officials if the inquiry delves into his conduct as a legislator on matters before the Illinois General Assembly. This evidentiary privilege is a necessary prophylactic. *United States* v. *Johnson, supra,* 383 U.S. at 182. Its purpose is the same as that of the substantive aspect of the Speech or Debate Clause: preservation of the independence of the legislature. *Id.*

The Government does not challenge this construction of the speech or debate privilege. It concedes that were it attempting to prosecute a member of Congress, he would enjoy the privilege Markert asserts in this case. The Government contends however that the privilege should

apply only to questioning of legislators by co-equal branches of government. The policy served by the privilege, the Government argues, is separation of powers; because the national government is supreme, the privilege is inapplicable in this case.

This argument ignores the federal nature of the American system of government. The Constitution confers upon the national government only limited powers. Those powers not granted remain within the domain of the separate states. The reservation of power for the states is not only the import of the Tenth Amendment but also a basic understanding of the draftsmen of the Constitution. "The proposed Constitution, so far from implying an abolition of the State governments * * * leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government." The Federalist, No. 9 at 76 (New American Library Ed. 1961).

The role of the states under the new federal constitution was also a central issue in the ratification debates. Opponents claimed that the new national government would soon engulf the states, eliminating all of their power and control over local affairs. See II Elliot's Debates, *supra* at 308 (New York), at 469 (Pennsylvania); III Elliot's Debates, *supra* at 171 (Virginia). Yet in state after state speakers arose to assure their fellow delegates that the Constitution would work no such change; the states would remain an important unit of the government. See II Elliot's Debates, *supra* at 168 (Massachusetts), at 199 (Connecticut); IV Elliot's Debates, *supra* at 316 (South Carolina). The Constitution creates a federal system of government; people are subject to two sets of

laws, those of the national government and those of the states. The essence of this federal structure is that on matters of national importance, the Congress shall legislate; on matters of local concern, the state legislatures shall enact the laws. See The Federalist No. 38, *supra;* Grant, The Nature and Scope of Concurrent Power, 34 Columbia L. Rev. 995 (1934). Therefore, state legislatures acting within the scope of their powers perform a function as vital to the governance of the state as the role Congress fulfills with regard to the nation as a whole.

Although the speech or debate privilege embraces notions of the separation of powers among co-equal branches of government, its primary message is that legislatures must be able to discharge their lawful responsibility in an atmosphere free from the threat of interference by other governmental units. A legislator in considering whether to support or oppose a proposed law must be free to reflect on the merits; he must not be deterred from advocating a position by the threat of prosecution by a hostile executive. The evil is the fact of deterrence; whether the threat emanates from the local or national executive makes no difference.

In the present case, the United States Attorney commendably conceded at the oral argument that a refusal to recognize a speech or debate privilege for state legislators would have an inhibiting effect on the conduct of members of the Illinois General Assembly. This threat to the legisture's independence is fundamentally inconsistent with the idea of legislative action reflected in the policy, purpose and history of the privilege and inherent in the words: "for any Speech or Debate in either House, they shall not be questioned in any other Place." U.S. Const. Art. 1 § 6. Deterring a legislator from advancing a point of view, or influencing how he votes by requiring him to

explain his motives before a grand jury is precisely the evil the speech or debate privilege intends to prevent. The protection of the First Amendment does not ameliorate this threat to legislative independence. The protection of freedom of speech does not provide a privilege against giving evidence. *Branzburg* v. *Hayes*, 408 U.S. 665. It does not prohibit a jury from questioning the motives of the speaker. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254. Therefore, it would not be an adequate substitute for the speech or debate privilege. Thus, in view of the purposes of the speech or debate privilege, its common law history, and the important role of the states in governing the country, we hold that state legislators are entitled to a federal common law speech or debate privilege applicable in federal criminal prosecutions. The privilege is simply too important to our conception of government to be abolished by judicial fiat in a federal criminal prosecution under a statute of general applicability.[4] The concurring opinion herein incorrectly, we believe, assumes that the existence of this privilege is dependent on an underlying immunity.[5]

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[4] The Hobbs Act (18 U.S.C. § 1951) and the Mail Fraud Statute (18 U.S.C. § 1341) are not narrowly drawn attempts by Congress to regulate the conduct of state legislators. These statutes therefore provide no compelling federal interest which requires us to consider whether the privilege may be abrogated by Congress.

[5] The concurring opinion argues that because state legislators have no official immunity from federal criminal prosecutions, they should likewise have no privilege. But the evidentiary privilege conferred on members of Congress follows not from any substantive immunity but from the Speech or Debate Clause itself. A member of Congress is not immune from prosecution on charges of bribery or conflict of interest. *United States* v. *Brewster, supra; United States* v. *John-*

(Footnote continued)

Principles of federal-state comity—"a proper respect for state functions" (*Younger* v. *Harris*, 401 U.S. 37, 44) —reinforce our conclusion that this particular privilege was not rescinded by the Federal Rules of Evidence. Perhaps somewhat idealistically, the Court in *Tenney* v. *Brandhove, supra*, 341 U.S. at 378, stated that legislative abuses were to be corrected by self-discipline and the electorate. Subsequently, in *United States* v. *Brewster, supra*, 408 U.S. at 520, the Court more prudently noted that not only the "jurisdiction of Congress to punish its Members is not all-embracing," but also that the power of self-discipline has inherent limits. Here, however, the State of Illinois is under no such disabilities. While it is within the province of the United States Attorney to prosecute local officials who violate federal law, the primary responsibility for ferreting out their political corruption must rest, until Congress directs otherwise, with the State, the political unit most directly involved. Federalist No. 17, *supra* at 120. Admittedly, legislators may

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(Footnote continued)

son, supra. Yet the prosecutor is prohibited from attempting to prove those offenses by questioning the congressman about the motives for his legislative acts. *Ibid*. The privilege rests on the constitutional judgment that the courts are not deemed the proper place to hold legislators accountable for their acts as elected representatives. *Tenney* v. *Brandhove, supra*, 341 U.S. at 378.

Implicitly, the concurring opinion argues that this principle of government is not applicable here because state legislators have no reason to expect interference in their affairs by a United States Attorney. This argument not only ignores the reality of the case, evidenced by the concession of the United States Attorney at oral argument that Illinois legislators would be inhibited in their official conduct were no privilege recognized; it also disregards the wisdom of the founding fathers, who feared that the federal government would impermissibly intrude upon the power of the states to govern their own affairs. See Federalist Nos. 23, 29, *supra*.

abuse their freedom of debate and discussion. But the common law history of the privilege in England and the United States teaches emphatically that it is better to tolerate the potential abuses than to risk the harm to our system of government that would result from inhibiting a legislator's discharge of the responsibility conferred upon him by the electorate. Our decision today does nothing more than recognize that important judgment.

II

Having determined that Markert enjoys a common law speech or debate privilege, we must now determine whether he waived its protection. The Speech or Debate clause is intended to provide a personal safeguard for the individual legislator and an institutional immunity for the legislature itself. *United States* v. *Brewster*, *supra*, 408 U.S. at 507; *United States* v. *Johnson*, *supra*, 383 U.S. at 179. This dual protection follows from the belief that the legislature's independence is predicated upon the independence of its members. *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 377. As long as the individual legislator can perform his function free from the threat of judicial and executive interference, the policy of the privilege is not offended. It therefore follows that to the extent the inquiry impugns only the personal independence of the legislator and does not call into question the independence of other members of the body, the protection of the speech or debate privilege can be waived.

In a criminal prosecution, a state legislator has a right under the due process clause to put into issue his own conduct as a representative if relevant. See *United States* v. *Nixon*, 418 U.S. 683, 711; *Washington* v. *Texas*, 388 U.S. 14, 19. Once introduced, the prosecution must be permitted to respond. Recognition of a privilege means

that some relevant evidence will not be before the trier of fact. Because of the policies supporting the privilege, the courts are willing to tolerate this "derogation of the search for truth." *United States* v. *Nixon*, *supra*, 418 U.S. at 709. However, it is a far more severe, and we believe impermissible, distortion of that process to admit evidence without affording the other party a chance to respond, or to hear testimony without permitting the opposition to cross-examine. This is fundamentally inconsistent with the view that "the two-fold aim [of criminal justice] is that guilt shall not escape or innocence suffer." *Berger* v. *United States*, 295 U.S. 78, 88. Once the legislator has chosen to make his conduct an issue, the court's interest that its processes not be subverted outweighs the claim of privilege. See *Branzburg* v. *Hayes*, *supra*.

This analysis is consistent with the Supreme Court's note in *Gravel* v. *United States*, *supra*, 408 U.S. at 622 n. 13, that a Senator can waive his aide's claim of privilege.[6] If so, the Senator, and Markert in this case, should similarly be able to waive his own privilege. The courts have often held that evidentiary privileges may be waived by the involved individual. *E.g.*, *United States* v. *Pauldino*, 487 F.2d 127 (10th Cir. 1973), certiorari, denied,

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[6] The defendant contends that this footnote means that the Senator could simply acknowledge to the court that the aide was not acting as his agent. If so, the footnote is extraneous because the privilege would not apply. Therefore, it seems likely that the Court meant a Senator could require his aide to testify about actions which, if done by the Senator, would be within the scope of the privilege. Since the aide and the Senator are considered one for the purposes of the privilege (*Gravel* v. *United States*, *supra*, 408 U.S. at 616), the Senator must be able to waive the protection of the clause for himself as well as his aide.

415 U.S. 981; *United States* v. *Moorman*, 358 F.2d 31 (7th Cir. 1966), certiorari denied, 385 U.S. 866; *Johnson* v. *United States*, 270 F.2d 488 (9th Cir. 1959), certiorari denied, 362 U.S. 924. The essence of a waiver is voluntary conduct. A decision to forego the protection of a privilege, to be valid, must be a free choice, and hence presents no challenge to the independence of the legislator.[7] Markert has not shown why his privilege should not be waivable as long as the waiver is limited to his own conduct.

In deciding whether Markert waived his privilege in this case, we need not find a knowing and intelligent forfeiture of the right. See *Johnson* v. *Zerbst*, 304 U.S. 458, 464; *United States* v. *Escander*, 465 F.2d 438, 441 (5th Cir. 1972); *United States* v. *Michael*, 426 F.2d 1067, 1069 (7th Cir. 1970). The lesser standard of voluntariness applies because the policy served by the privilege is not related to the fairness of the trial. *Schnekloth* v. *Bustamonte*, 412 U.S. 218, 242. Under the test of voluntariness, it need be shown only that the testimony is the "product of an essentially free and unconstrained choice by its maker." *Schnekloth* v. *Bustamonte*, *supra*, 412 U.S. at 225; *Columbe* v. *Connecticut*, 367 U.S. 568, 602. The question

[7] Because the Speech or Debate clause embodies institutional as well as personal protection, the scope of the waiver must be carefully limited. The difficulty is that the individual legislator's testimony and other evidence may involve not only his conduct but also that of the body as a whole. At that point the law is clear that "the Speech or Debate Clause clearly proscribes at least some of the evidence." *United States* v. *Johnson*, *supra*, 383 U.S. at 173. A clear threat to the institution's ability to function would be presented if members knew that one of their colleagues, by waiving his privilege, could raise doubts in the minds of grand jurors about the propriety of their conduct. Thus any waiver must be strictly limited to the conduct of the individual representative.

is the defendant's subjective state of mind, to be determined after an examination of all the facts and circumstances. *Schnekloth* v. *Bustamonte*, *supra*, 412 U.S. at 249; *Kelly* v. *Peyton*, 420 F.2d 912, 914 (4th Cir. 1970).

Markert contends that the facts of this case indicate that the decision to testify was not freely made. The heart of his argument is that he was not informed of his right to claim a speech or debate testimonial privilege either by the Government or by his own counsel. However, the Supreme Court has never held that the failure to inform the defendant of a privilege unrelated to trial fairness mandates a finding that the decision was not voluntary. *Schnekloth* v. *Bustamonte*, *supra*, 412 U.S. at 227; accord, *Byrd* v. *Lane*, 398 F.2d 750, 755 (7th Cir. 1968), certiorari denied, 398 U.S. 1020. When he appeared before the grand jury, he gave potentially damaging testimony rather than relying on his privilege against self-incrimination, of which he had been informed. Because he made a conscious choice to testify, he waived the instant privilege. Although subpoenaed before the grand jury, Markert was not compelled to testify in violation of any of his rights. See *United States* v. *Calandra*, 414 U.S. 338, 346; *Kastigar* v. *United States*, 406 U.S. 441, 448. Because he was a state legislator, knowledgeable in the workings of the Government and represented by competent counsel, his election to testify waived his Speech or Debate clause privilege.

The order of suppression is reversed and the cause is remanded for further proceedings consistent herewith.

TONE, *Circuit Judge*, concurring. I concur in the result. I agree with the court that the speech or debate clause of the Illinois Constitution is inapplicable in this

federal criminal proceeding, and that the question to be decided is whether the federal common law of evidence includes the privilege asserted. I disagree, however, with the court's view that, absent waiver, the defendant could claim a speech or debate privilege under the federal common law of evidence.

Several recent opinions of the Supreme Court have made it clear that the protection afforded state legislators from liability under federal law for acts done in their legislative roles, see *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), is not based upon the speech or debate clause of the Federal Constitution, see *United States* v. *Brewster*, 408 U.S. 501, 516 n. 10 (1972), a clause that applies only to Congress, but rather upon the common-law doctrine of official immunity. See *Wood* v. *Strickland*, 420 U.S. 308, 316-318 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232, 243-244 (1974); *Doe* v. *McMillan*, 412 U.S. 306, 318-320 (1973). This is the same doctrine that was applied in *Pierson* v. *Ray*, 386 U.S. 547, 554-555 (1967), to provide immunity to a judge for acts done in the course of his judicial duties.[1]

The speech or debate clause of the Federal Constitution protects members of Congress from being "questioned in any other Place" concerning the Supreme Court has held, "legislative acts or the motivation for actual performance of legislative acts." See *United States* v. *Brewster*, *supra*, 408 U.S. at 509. The clause provides both immunity from liability and a commensurate privilege against disclosure. *Gravel* v. *United States*, 408 U.S. 606, 616 (1972). The privilege against disclosure and the

[1] *Tenney* v. *Brandhove* and *Pierson* v. *Ray* held that Congress had not intended by adopting the Civil Rights Acts to abrogate the official immunity of legislators and judges, supported as it was by strong tradition and sound reasons.

immunity from liability should also be commensurate when the basis for protection is common-law official immunity. Where there is no immunity, it would be incongruous, if not useless, to recognize an evidentiary privilege. Accordingly, I think that whether the claimed privilege should be recognized as a development in the federal common law of evidence depends on whether there is an underlying immunity.

The common-law immunity of state legislators has not been held to be coextensive with that which members of Congress enjoy under the federal speech or debate clause. Even with respect to civil liability, speech-or-debate immunity is broader than official immunity. The former bars injunction actions directed at legislative activities of Congress. *E.g.*, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975); *Powell* v. *McCormick*, 395 U.S. 486 (1969). The doctrine of official immunity, on the other hand, has been held by one court not to bar injunctive relief against state legislative activities which offend federal law, *Jordan* v. *Hutcheson*, 323 F.2d 597 (4th Cir. 1963), and in other cases federal injunctions against state legislative action have been sustained without discussion of the question of immunity. *E.g.*, *Bond* v. *Floyd*, 385 U.S. 116 (1966); *Bush* v. *Orleans Parish School Board*, 191 F.Supp. 871 (E.D. La.), *aff'd sub nom. Denny* v. *Bush*, 367 U.S. 908 (1961).

Unlike federal speech or debate immunity, see *United States* v. *Johnson*, 383 U.S. 169 (1966), common-law official immunity has not been extended to criminal liability. In *O'Shea* v. *Littleton*, 414 U.S. 488, 503 (1974), the Court said:

> "[W]e have never held that the performance of the duties of judicial, legislative, or executive officers,

> requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. . . . On the contrary, the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct as proscribed by an Act of Congress. . . .' [Citing *Gravel* v. *United States, supra,* 408 U.S. at 627.]"

Thus judicial officers are not immune from criminal liability for conduct within the scope of their judicial duties. *Braatelien* v. *United States,* 147 F.2d 888, 895 (8th Cir. 1945); see also *United States* v. *Manton,* 107 F.2d 834 (2d Cir. 1939). State legislators are similarly subject to federal criminal liability for analogous conduct which falls within the prohibition of a federal criminal statute, as the Court stated in *O'Shea.*

Immunity from civil but not criminal liability has been regarded as sufficient to achieve the purpose of the doctrine of official immunity, which is to promote independence and fearless discharge of duty on the part of the protected officials. While the federal speech or debate clause serves the same purpose, it has an additional, more fundamental purpose grounded in the separation of powers in the federal government. As the Court said in *Gravel* v. *United States, supra,* 408 U.S. at 616, 617:

> "The Speech or Debate Clause was designed to insure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.
>
> . . .
>
> "[T]he central role of the Speech or Debate Clause [is] to prevent intimidation of legislators by the Executive and accountability before a possible hostile judiciary, *United States* v. *Johnson,* 383 U.S. 169, 181 (1966). . . ."

There being no problem of separation of powers between the federal executive (represented in this case by the

United States Attorney) and a state legislature, the Constitution itself does not create an immunity for state legislators as it does for members of Congress. I see no need for the courts to do so either. Nothing in our history or in the authorities relied upon by the court in this case suggests that there is a threat of federal executive interference with the independence of state legislatures that would warrant extending the judicially developed doctrine of official immunity beyond its traditional boundaries. Accordingly, I would hold that the state legislator's official immunity does not extend to liability under federal criminal statutes, and that he therefore has no commensurate official[2] privilege against disclosure.

In questioning the view that the existence of the privilege should depend upon whether there is a corresponding immunity, the majority states in footnote 5 that "[a] member of Congress is not immune from prosecution on charges of bribery or conflict of interest," and "[yet] the prosecutor is prohibited from attempting to prove those offenses by questioning the congressman about the motives for his legislative acts," citing *Brewster* and *Johnson.* This overlooks, I believe, an important distinction made in *Brewster.* As I understand that case, it did not hold that conduct which is not protected by an immunity from liability may nevertheless be privileged from inquiry. Brewster was charged with taking bribes in return for being influenced in respect of his official acts and with taking a bribe for an official act already performed by him. The Court held that the speech or debate clause permitted the government to prosecute those charges, because it could be done without inquiring into "the legisla-

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[2] He has of course the same privilege against self-incrimination that any other citizen has. He has not chosen to assert that privilege in this case.

tive acts of the defendant member of Congress or his motives for performing them." 408 U.S. at 526, quoting from *Johnson, supra,* 383 U.S. at 185. See also 408 U.S. at 527. The Court said:

> "There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.
>
> "Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act." *Id.* at 526.

On the other hand, prosecution for legislative acts and inquiry into those acts or their motives, would have been prohibited by the speech or debate clause. Since bribe taking, however, was not protected by the speech or debate clause, the Court held that "inquiry into [such] activities" was not prohibited by the speech or debate clause. 408 U.S. at 528. In other words, for those acts for which there was no immunity, there was likewise no testimonial privilege. Thus *Brewster* shows that the immunity and the privilege are correlated.

The majority further states in the same footnote that the testimonial privilege for state legislators "rests on the constitutional judgment that the courts are not deemed the proper place to hold legislators accountable for their acts as elected representatives," citing *Tenney* v. *Brandhove.* I do not believe *Tenney* supports the view that state legislators have a speech or debate immunity derived from the Federal Constitution. See p. 14 above. If they do not, and if I am correct that the doctrine of official immunity leaves state legislators criminally liable under federal law for even their legislative acts, I cannot believe they are privileged (unless they choose to avail

themselves of their fifth amendment right) to withhold testimony concerning acts for which they may be prosecuted.

In reaching the conclusion expressed in this concurring opinion, I have assumed that the Mail Fraud Act (18 U.S.C. § 1341) and the Hobbs Act (18 U.S.C. § 1951) extend to conduct of a state legislator in the performance of his official duties. It would be inappropriate, if not beyond our jurisdiction, to pass on the sufficiency of the indictment in this interlocutory appeal of an order suppressing evidence. *Cf. United States* v. *Merritts,* ..... F.2d ....., No. 75-1198, Slip Op. p. 4 (7th Cir. 1975). Moreover, it is unnecessary to consider the scope of those statutes in order to decide this appeal: applying the approach of *Tenney* and *Pierson,* determining whether the doctrine of official immunity shields given legislative conduct is only a preliminary step in resolving the ultimate question of whether Congress intended a statute to apply to that conduct. It is accordingly unnecessary to reach that question in order to decide this case.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 27, 1976.

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. Philip W. Tone, Circuit Judge
Hon. Robert L. Kunzig, Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

No. 75-1592 vs.

ROBERT CRAIG, THOMAS J. HANAHAN and LOUIS A. MARKERT,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
(74 Cr 877)

On consideration of the defendants-appellees' petition for rehearing filed in the above-entitled cause,

It Is Ordered that the defendants-appellees' petition for rehearing in the above-entitled appeal be, and the same is hereby, Denied.

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* Judge Robert L. Kunzig of the United States Court of Claims is sitting by designation.